

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,136

251

F. S. BOWEN ELECTRIC CO., INC.,

Appellant,

v.

J. D. HEDIN CONSTRUCTION CO., INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 8 1962

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STATEMENT OF QUESTIONS PRESENTED :

1. Whether the District Court, in deciding a motion for summary judgment, may consider supporting affidavits not based on personal knowledge, but solely based on information and belief.

2. Whether the District Court erred in granting summary judgments for defendants in a suit to set aside certain conveyances as fraudulent where the supporting affidavits, based on information and belief, do not deny the allegation that the conveyances were fraudulent, and where the allegation, if denied, necessarily presents a genuine issue of material fact which could not be determined summarily.

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FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final decision of the United States District Court for the District of Columbia granting the motion of all defendants for summary judgment and dismissing the complaint as to all defendants. Jurisdiction of the District Court was based on 11 D.C. Code §305. Jurisdiction of this Court to hear and determine this appeal is invoked under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

On October 26, 1961, appellant commenced an action in District Court to set aside certain conveyances as fraudulent. Named as defendants were appellees J.D. Hedin Construction Co., Inc. (Hedin) and appellees Cella and Spriggs (J.A. 1-2).

The complaint alleged that appellant was a creditor of Hedin; that it had obtained a judgment for \$30,000 against Hedin on November 24, 1958; that Hedin had appealed from the judgment; that on appeal this Court remanded the case to reassess the award of damages; that pursuant to said remand, the District Court referred the action to a Special Master; that in January 1961 the Special Master found that appellant was entitled to judgment in the amount of \$34,151.86 with interest from November 24, 1958; that on October 24, 1961 said findings and conclusions were sustained by the court below and that judgment was thereupon entered against Hedin accordingly (J.A. 1-2).

The complaint further alleged that one of the principal, if not the only asset of Hedin was a valuable piece of real estate in the District of Columbia, to wit: -a hotel known as Hedin House, described therein (J.A. 2).

Complaining of defendants, appellant alleged that "in order to hinder, delay and defraud plaintiff and other creditors" the defendants caused the hotel to be conveyed to Defendant Cella on April 27, 1961 and to Defendant Spriggs on July 27, 1961 (J.A. 2).

Appellant alleged that said conveyances were fraudulent and should be set aside and prayed further that a receiver be appointed to conserve the assets of Hedin for the benefit of plaintiff and all other creditors (J.A. 2).

Defendants Cella and Spriggs moved for summary judgment dismissing the action as to them and for grounds stated that the property described in the complaint had been conveyed to a bona fide purchaser prior to commencement of the action (J.A. 3).

Before any action was taken on the motion, appellant obtained leave of the court to and filed an Amended Complaint (J.A. 6). The Amended Complaint reiterated the allegations of the original complaint and alleged further that the conveyance of July 27, 1961 was also to one Nicholson, who was added as a party defendant; and that on or about October 17, 1961, Defendants Spriggs and Nicholson transferred the hotel property to one Morris Abrams and Rose Abrams in order to convert said property to cash and to further hinder, defraud, and delay creditors of Hedin; that as a result of said transfer, Defendant Spriggs received approximately \$211,509.67 which purportedly represented the equity of Defendant Hedin in said property; that on or about the time the original complaint was filed, this sum of \$211,509.67 was transferred to New Amsterdam Casualty Co. for its own separate use and benefit in order to further hinder, delay and defraud Hedin's creditors (J.A. 6-8).

The Amended Complaint also added New Amsterdam Casualty Co. as a party defendant; and added a prayer that defendants pay into court the amount received for the property to be disbursed as the court shall direct (J.A. 8).

Defendants Cella, Spriggs, Nicholson and New Amsterdam Casualty Co. moved for summary judgment, urging the same grounds as in the prior motion, i.e., that the property had been conveyed (J.A. 8).

The motions came on before Judge Curran and, after oral argument, were granted "for the reason, among others, that indispensable parties are not named as defendants" and the Complaint and Amended Complaint were dismissed with leave given to plaintiff to file a new complaint (J.A. 9-10).

Appellant filed a Second Amended Complaint, which was identical with the Amended Complaint except that Appellees Morris Abrams and Rose Abrams, the record owners of the property, were added as defendants (J.A. 11-12).

Without answering the complaint, appellees moved for summary judgment on the ground that "there is no issue of law or fact in this cause nor is there any showing of any right on the part of plaintiff to the relief prayed" (J.A. 13).

Appellees Morris Abrams and Rose Abrams moved to dismiss on the separate ground that the complaint stated no claim against them upon which the relief prayed for may be granted (J.A. 13).

These motions came before Judge Tamm and, after oral argument, he granted the motion of defendants Morris Abrams and Rose Abrams and dismissed the complaint as to said defendants and also granted the motion for summary judgment to dismiss the complaint as to all defendants (J. A. 25-26). His order is dated May 7, 1962.

Plaintiff appeals from the Order of May 7, 1962.

The record before the court on the motions for summary judgment consisted of three affidavits, only one of which complied with Federal Rules of Civil Procedure Rule 56(e) in being based on personal knowledge. The affidavit apparently conforming to the Rule was that of Morris Abrams (J.A. 14) who stated that his acquisition of the hotel was as a personal investment as the result of arms-length negotiations and that the "consideration was paid without in any way intending to defraud any creditors" and without collusion.

The affidavit of Robert J. Murray, Director of the Fidelity and Surety Claim Division of New Amsterdam Casualty Co. (J.A. 15) was made on information and belief "from an examination of the records and correspondence of said New Amsterdam". He asserts that prior to November 25, 1959 New Amsterdam was the principal on various contractors' performance and payment bonds for Hedin; that New Amsterdam guaranteed a loan in the amount of \$480,000; that a deed of trust was executed on November 25, 1959 for the purpose of securing New Amsterdam with respect to the guarantee on the aforesaid loan of \$480,000 and

liability and debts (The deed of trust is to be exhibited to the Court on hearing the motion for summary judgment¹); that New Amsterdam had expended and contracted to expend more than \$1,000,000 as surety for Hedin; that the sale of the property to Abrams was a bona fide sale made solely for the purpose of using the proceeds to pay on account to New Amsterdam.

Appended to the affidavit as an exhibit is an undated letter from Real Estate Title Insurance Co. regarding title to the property (J. A. 17 - 22). Affiant avers that the state of the title as of July 22, 1961 was set forth in the exhibit; affiant further avers that said sale was effected in the belief that New Amsterdam had procured a lien on the property by reason of the deed of trust of November 25, 1959 and that it was entitled to the same and that the preference to New Amsterdam was lawful and subject to no challenge by any other creditor; and that affiant believed that the plaintiff is not entitled to challenge the transaction described in the action.

The affidavit of Appellee Spriggs (J.A. 3 - 6) recites that he is attorney, agent and trustee for New Amsterdam; that he has no beneficial interest in the property and makes no claim thereto. He states on information and belief that Hedin was indebted to New Amsterdam; that on November 25, 1959 a deed of trust on the property was executed and recorded on December 28, 1959 to secure New Amsterdam.

Upon information and belief, affiant avers that on October 9, 1961 Hedin was still indebted to New Amsterdam and that "with the authority and at the direction of the said New Amsterdam Casualty Company", he conveyed the property to Morris Abrams and Rose Abrams. His affidavit on information and belief further recites that the net proceeds of the sale amount to \$211,509.67 and was "accounted for and paid over to the New Amsterdam Casualty Company"; that all of the transactions in this sale "were in good faith, carried out with the sole purpose of bringing about a partial payment to the New Amsterdam Casualty Company". In

¹ The deed of trust was never made a part of the record.

his affidavit, he concludes that no conveyance of any property by him was in any way intended to hinder, delay or defraud any of the creditors.

None of the affidavits refer to the conveyances of April 27, 1961 and July 27, 1961 referred to in Par. 4 of the Second Amended Complaint.

Conforming to Local Civil Rule 9(b), the plaintiff listed the following as genuine issues of fact which preclude summary judgment:

1. Whether the various conveyances from Defendant Hedin Construction Co. and amongst the defendants were made for the purpose of hindering, delaying and defrauding creditors.

2. Was Defendant New Amsterdam Casualty Co. a creditor of Defendant Hedin on November 24, 1958 and to what extent?

3. Is Defendant Hedin merely a wholly owned subsidiary of New Amsterdam Casualty Co. and, if so, when did it become such (J.A 9)?

STATEMENT OF POINTS

1. The District Court erred in considering affidavits supporting a motion for summary judgment which were based on information and belief and not on personal knowledge.

2. The District Court erred in granting summary judgment for defendants and dismissing the complaint.

STATUTES, TREATIES, REGULATIONS, OR RULES INVOLVED

Federal Rules of Civil Procedure, Rule 56. "Summary Judgment".

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

"(e) Form of Affidavits; Further Testimony. Supporting

and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to all the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

District of Columbia Code (1961 Edition), Title 12, § 401:

"Intent to defraud creditors.

Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or rents and profits issuing from the same, or in goods or things in action, and every charge upon the same, and every bond or other evidence of debt given, or judgment or decree suffered, with the intent to hinder, delay, or defraud creditors or other persons having just claims or demands of their lawful suits, damages, or demands, shall be void as against the persons so hindered, delayed, or defrauded: Provided, That nothing herein shall be construed to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor: Provided further, That the question of fraudulent intent shall be deemed a question of fact and not of law."

SUMMARY OF ARGUMENT

1. The District Court erred in granting summary judgment for defendants because the affidavits supporting the motion were not based on personal knowledge. Federal Rule of Civil Procedure 56(e) requires supporting affidavits to be on personal knowledge and the decided cases declare this requirement to be mandatory. If the improper affidavits are excluded from consideration, there is nothing in the record on which to base the summary judgment and it therefore should be reversed.

2. Even if the improper affidavits are considered, there is still no basis for summary judgment because there are genuine issues of

material fact. The basic issue is whether the challenged conveyances were made to hinder, delay or defraud plaintiff and other creditors. Defendants did not deny the allegation that the conveyances of April 27, 1961 and July 27, 1961 were fraudulent. And a denial would simply confirm the issue and preclude summary judgment. Further, in cases such as this where good faith is involved, the court should have declined to grant summary judgment.

3. The Abrams are indispensable parties because title to their property is being questioned. It was therefore error to dismiss the action against them.

ARGUMENT

I.

SUMMARY JUDGMENT WAS IMPROPER BECAUSE THE SUPPORTING AFFIDAVITS WERE NOT BASED ON PERSONAL KNOWLEDGE AS REQUIRED BY RULE 56(e)

The District Court should not have granted summary judgment because the record before it contained no proper supporting affidavits. The record before the court at the time of the motion (and, indeed, the record at the time of appeal) consisted solely of the complaint and three affidavits filed in support of the motions for summary judgment. One of these affidavits -- that of Appellee Abrams -- is not pertinent to the main issue involved but rather is directed to the separate motion to dismiss. The other two affidavits of Appellee Spriggs and Appellee New Amsterdam's Robert Murray were not based on personal knowledge of the affiants but were solely on information and belief.²

Federal Rule of Civil Procedure 56(e) states as follows:

"Supporting and opposing affidavits shall be made on

² The affidavits are also objectionable in that they contain many facts which would not be admissible in evidence because hearsay.

personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein."

The courts have uniformly held that this requirement of Rule 56 is mandatory and the court is not at liberty to consider affidavits made on information and belief. In Jameson v. Jameson, 85 U.S. App. D.C. 176 (1940), 176 F. 2d 58, this Court said:

"This rule plainly requires (the word 'shall' being mandatory) that an affidavit state matters personally known to the affiant. A statement in such affidavit as to what the affiant 'verily believes' does not satisfy this requirement. Belief, no matter how sincere, is not equivalent to knowledge. It is further required that the facts set forth in the affidavit be such as would be admissible in evidence should they be given from the witness stand during trial of that case. The statements in appellant's affidavit which we have outlined above would, if given as testimony, be clearly objectionable as being hearsay. ***"

(p. 60)

In Zampos v. U.S. Smelting Refining and Mining Co., 206 F. 2d 171, the 10th Circuit said:

"On a motion for summary judgment, the burden rests upon the moving litigant to show that there is no genuine issue in respect to any material fact and that he is entitled to judgment in his favor as a matter of law. Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 3 Cir. 190 F. 2d 817; Dulansky v. Iowa-Illinois Gas & Electric Co., 8 Cir., 191 F. 2d 881. All substantial doubts are to be resolved against him, and his supporting affidavits and depositions, if any, are to be carefully scrutinized. Hoffman v. Partridge, 84 U.S. App. D.C. 224, 172 F. 2d 275. A supporting affidavit must present evidence which is admissible and must not only be made on the personal knowledge of the affiant but must show that he possesses the knowledge asserted. Walling v. Fairmont Creamery Co., 8 Cir., 139 F. 2d 318. And where it appears from the whole case, including the affidavits and depositions, if any, submitted in support of the motion, that there is a genuine issue respecting a material fact, the opposite party need not file

counter affidavits. Albert Dickinson Co. v. Mellos Peanut Co., 7 Cir., 179 F. 2d 265. ***"

(p. 174)

That the Spriggs affidavit is made by an attorney adds nothing to its force. In fact, the cases hold that such affidavits where the attorney had no personal knowledge of the facts, have no probative value.

Mercantile National Bank v. Franklin Life Insurance Co., 248 F. 2d 57, 59 (5 Cir. 1957).

It should be noted that defendants have never filed an answer to the complaint in this suit. The absence of an answer, coupled with the absence of proper supporting affidavits, should have precluded consideration of defendants' motion for summary judgment. In the circumstances, the allegations of the complaint should be taken as true. This was the holding in Rogers v. Girard Trust Co., 159 F. 2d 239 (6 Cir. 1947), in which the Court said:

"On motion for summary judgment, no answer having been filed, every allegation of the complaint is to be taken as true. Doehler Metal Furniture Co. v. United States, 2 Cir., 149 F. 2d 130, 135; Weisser v. Mursam Shoe Corporation, 2 Cir., 127 F. 2d 344, 145 A.L.R. 467; Ramsouer v. Midland Valley R. Co., 8 Cir., 135 F. 2d 101."

In view of the foregoing, the court should not have even considered the motion for summary judgment. Irrespective of what the affidavits contained, the court could not properly consider them in deciding the motion.

II.

EVEN IF THE IMPROPER SUPPORTING AFFIDAVITS ARE CONSIDERED, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED BECAUSE THERE WAS A GENUINE ISSUE WHETHER THE CONVEYANCES WERE MADE TO HINDER, DELAY OR DEFRAUD PLAINTIFF AND OTHER CREDITORS

**A. Defendants Did Not Deny The Allegation
That The Conveyances From Hedin to New
Amsterdam Lawyers Were Fraudulent.**

The Court should not have granted summary judgment because there were genuine issues of material fact, even if the improper affidavits are considered.

The gist of the complaint is that the transfer of title of Hedin House from Hedin was done to hinder, delay or defraud plaintiff and other creditors of Hedin. The complaint specifies that the transfer of title was accomplished by two deeds from Hedin - one, on April 27, 1961, to Cella and the other, on July 27, 1961, to Spriggs and Nicholson (J.A. 11, paragraph 4).

There are several genuine issues unresolved by the record (see, J.A. 9) but the most important is whether these two conveyances were made to hinder, delay or defraud creditors. This is the fundamental issue in the case and the most astonishing aspect of the decision below is that nowhere in the record is there any denial of the allegation that these conveyances were fraudulent. In none of the supporting affidavits, even though made on information and belief, is there any denial of the allegation that these conveyances were made to hinder, delay or defraud creditors.

Appellee Spriggs averred "that no conveyance of any property was made by him or by said Peter R. Cella, Jr., Esquire, which in any respects was intended to, or in fact did, hinder, delay or defraud any creditor of said J. D. Hedin Construction Co." (J.A. 6). But the allegation of the

complaint is not that Spriggs and Cella made fraudulent conveyances but that the conveyances to them on April 27, 1961 and July 27, 1961 were fraudulent. The Spriggs affidavit carefully avoids the basic allegation. It carefully avoids even mentioning these conveyances. The affiant may be commended for his candor and his careful choice of language but surely this does not afford a basis for summary judgment.

In his affidavit, Spriggs refers to a deed of trust of the property of November 25, 1959 (J.A. 4). Significantly, he does not contend that the conveyance of October 7, 1961 to the Abrams was made in accordance with the deed of trust of pursuant to the deed of trust. The deed of trust is not in the record, but this Court could well take judicial notice that default provisions in deeds of trust generally provide for sale at public auction after adequate public advertisement. No such course was followed in the sale to the Abrams. Irrespective of the specific terms of the deed of trust, the trustees have certain responsibilities in making a sale (cf. Holman v. Ryon, 61 U.S. App. D.C. 10 (1932), 56 F. 2d 307).

Defendants also filed a "Statement of Undisputed Facts Per Local Rule 9(b)" but even this is completely silent as to the conveyances of April 27, 1961 and July 27, 1961. With remarkable frankness, defendants do not deny that the purposes of these conveyances, and the conveyance to Abrams, was to hinder, delay and defraud plaintiff. The only statement made was that the sale to Abrams was "without collusion and was for a valid consideration", but this begs the question.

Plaintiff specifically alleged that the conveyances of April 27 and July 27, 1961 were made to hinder, delay or defraud creditors. Nowhere in the record do defendants deny the allegation. The court's action in granting summary judgment for defendants was accordingly incorrect.

**B. Even If Denied, The Allegation That
The Conveyances Were Fraudulent
Should Not Have Been Decided Summarily.**

Assuming arguendo that the appellees had denied the allegation, still the District Court would not be at liberty to deny plaintiff a trial by granting summary judgment. This is because the question raised is peculiarly a question of fact. It is specifically made a question of fact by statute. The D.C. Code, § 12-401, provides that every conveyance of any estate in lands:

"with the intent to hinder, delay or defraud creditors or other persons having just claims or demands of their lawful suits, damages, or demands, shall be void as against the persons so hindered, delayed or defrauded ***
Provided further, That the question of fraudulent intent shall be deemed a question of fact and not of law."

Since the D.C. Code expressly makes the question of fraudulent intent a question of fact and not of law and since the plaintiff alleged the conveyances were made to hinder, delay and defraud, it was improper to grant summary judgment for defendants. The duty of the District Court in these circumstances was set forth by this Court in Snider v. Kelly, 77 U.S. App. D.C. 363, 135 F. 2d 817 (1943) as follows:

"When the issue is presented to a trial court, its duty is to determine, from the facts and circumstances surrounding the transactions of the parties, whether the proscribed intent was present: in doing so, it should apply the rule that parties intend the natural and probable consequences of their acts; and 'if the inevitable consequences of a conveyance are to hinder, delay or defraud creditors, the court must so hold notwithstanding the denial of such intent by the parties to such conveyance.' [Italics supplied.] If, on the other hand, it appears, from all the facts and circumstances surrounding the case, that the acts of the parties are consistent with an honest purpose, then it is not an inevitable consequence that the conveyance will hinder, delay or defraud creditors, and the court should find accordingly. Even if a transaction is, on its face, presumptively fraudulent, nevertheless it is susceptible of explanation. As the Supreme Court has said:

'Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud, there is no infirmity in the deed. Every case depends upon its circumstances, and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test.'

C. Where Good Faith Is In Issue, Summary Judgment Is Ordinarily Inappropriate.

The basic issue raised in this case, i.e., the intent or purpose of Hedin in conveying its only substantial asset to attorneys for appellee New Amsterdam, is singularly inappropriate for summary disposition. Under Rule 56, there must be supporting affidavits based on personal knowledge, and, of course, these must deny the allegations of the complaint. Neither situation is present here, and on the state of the record, the District Court could not have properly granted summary judgment. But, in addition, the nature of the suit would make summary action appear inappropriate. As this Court said in Dewey v. Clark, 86 U.S. App. D.C. 137 (1950), 180 F. 2d 766:

"*** the presence of the question of good faith as a crucial one should cause the court to hesitate more than ordinarily before concluding that it is in a position to deny a trial. Upon trial there will be the opportunity for cross examination and the question of credibility will be left to the trier of the facts ***."

(180 F. 2d at 773;
 ____ U.S. App. D.C. at 144)

III

THE ACTION AGAINST THE ABRAMS SHOULD
NOT HAVE BEEN DISMISSED BECAUSE THEY
ARE INDISPENSABLE PARTIES

Morris and Rose Abrams are the owners of record of the property alleged to have been fraudulently conveyed (J.A. 14). Because of this fact, they are indispensable parties to the action. This was the holding of Judge Curran, who dismissed the Amended Complaint because they were not named as defendants (J.A. 9 - 10). Following Judge Curran's ruling, plaintiff amended its Complaint and named the Abrams as defendants (J.A. 10).

Inasmuch as they are indispensable parties, the court erred in dismissing the action against the Abrams.

CONCLUSION

In view of the foregoing, the decision of the District Court should be reversed and the case remanded for further proceedings.

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Attorney for Appellant

August 7, 1962.

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QUESTIONS PRESENTED

1. So far as counsel for appellees can judge, the sole question before the Court is whether the affidavits and documents tendered in support of the motion of defendants for summary judgment meet the requirements of Rule Fifty-Six, Federal Rules of Civil Procedure, against a challenge that, although completely uncontradicted, appellees' affidavits are made only on information and belief.

2. The second question posed by appellant is based upon the premise that appellees failed below to deny fraud. Since such assumption is patently and demonstrably false, the question is, of course, irrelevant and improper.

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* Cases chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

The parties will be described as they appear in the court below.
For the purpose of this appeal it is unnecessary to refer to the pleadings

prior to the filing of the Second Amended Complaint^{*} except with respect to one affidavit of Kahl K. Spriggs used in support of the defendants' first motion for summary judgment (J.A. 3).

The Second Amended Complaint (hereinafter called the Complaint) appears to seek an adjudication that certain conveyances of real property be adjudged fraudulent and that the defendant New Amsterdam Casualty Company (hereinafter called "New Amsterdam") be required to account for the proceeds of the sale of the property and pay the same into court (J.A. 10-12). The Complaint fails to particularize the fraud alleged. It merely asserts that a conveyance of a hotel building owned by J. D. Hedin Construction Company known as Hedin House to trustees^{**} was "to hinder, delay and defraud" creditors of J. D. Hedin Construction Company (hereinafter called "Hedin"), including the plaintiff, and a sale thereafter of the property to its present owners, Mr. and Mrs. Morris Abrams, was "to further hinder, defraud and delay" creditors of said Hedin Company (J.A. 11-12). The defendants have all answered, and have denied that the conveyances were fraudulent in any way (J.A. 3, 13-17).

The defendants have filed affidavits in support of their motion for summary judgment. These are made by Robert J. Murray, Director of New Amsterdam's Fidelity and Surety Claim Division, (J.A. 15), Kahl K. Spriggs, Esquire, an outstanding and distinguished

^{*} The original complaint attempted to set aside a conveyance without the presence of Morris Abrams and wife, owners of the property. A motion to dismiss for absence of indispensable parties was pending when plaintiff's counsel, without leave of court, filed an amended complaint which omitted a prayer for relief as to the property itself (J.A. 6-9). The trial judge granted the motion, and plaintiff's counsel then filed a second amended complaint, adding the owners of the property, which he obviously did not then need to do since he had no prayer relating to the property itself.

^{**} On April 27, 1961, a deed of trust was made to a single trustee, but for technical reasons Kahl K. Spriggs and his law associate (who were attorneys for New Amsterdam Casualty Company) became the trustees in place of the original trustee, Peter R. Cella, Jr. These intermediate conveyances are not important to the issues on this appeal.

member of this bar, who was attorney for New Amsterdam at the time of the transactions challenged by plaintiff (J.A. 3), and Morris Abrams who, with his wife, bought the property, (J.A. 14). These affidavits have not been challenged as in any respect untrue, and there are no affidavits filed by plaintiff in opposition, nor indeed has plaintiff's counsel so much as challenged the truth of any statement in the affidavits.

The defendants' affidavits establish the following facts, briefly summarized:

Prior to November 25, 1959, New Amsterdam Casualty Company had bonded several construction jobs for the Hedin Company and, having become guarantor on a note to a bank of Hedin for \$480,000.00 and apprehending the possibility of further liability on sundry jobs, had procured to secure itself a conveyance of Hedin House to trustees for its benefit (J.A. 4, 15). This deed of trust was exhibited to the Court (J.A. 15). The title remained in Hedin, subject to this deed of trust, and subject to numerous other liens and encumbrances, until October, 1961, when a sale of the property was negotiated to Morris Abrams, a complete stranger to any of the parties, in good faith and at arms-length, for \$400,000.00, which is the fair market value of the property (J.A. 5, 14, 16). The net proceeds of this sale, after discharging liens and encumbrances other than that of New Amsterdam, was about \$211,000.00, and this sum was paid over to New Amsterdam as a credit against a debt owed by Hedin to it, arising out of the construction jobs it had bonded and which had reached to a sum of about \$1,250,000.00 (J.A. 16).

The records of this Court, and of the Court below, show that the plaintiff had obtained judgment against J. D. Hedin Construction Company, in Civil Action No. 717-57, for \$30,000.00 on November 24, 1958; that its judgment was reversed by this Court and that, as a result of further proceedings had by direction of this Court, a new judgment was entered against Hedin for \$34,151.86 on October 24, 1961. (It is

to be noted that the plaintiff's action now before this Court on this appeal does not constitute a suit to foreclose the lien of a judgment. If it were, the issues would be very different).

These are all of the essential facts. The record was made very full by counsel for defendants for these reasons: The issue is fraud. Several of the defendants are lawyers, who are personally sensitive to such charges, and who as lawyers have felt constrained to respond quickly and fully. The defendant bonding company has felt obliged, also, to state in detail all the facts known by it to be pertinent to the matter. The defendant Morris Abrams, who is aggrieved at being brought into a proceeding in which he is merely a purchaser in good faith and for full value of the property, is also a member of the bar of this Court, and he, too, has made a full disclosure of all the known pertinent facts. There has been a serious effort in this case, on the part of defendants, to negate fraud in every possible detail and with complete candor. On his part, plaintiff's counsel has presented no factual controversy but, on the contrary, has recklessly charged fraud without any support in the record. More than that, he has failed to comply with Rule 9(b) of the Federal Rules of Civil Procedure, which requires averments of fraud to be made "with particularity".

There is no assertion in any pleading or otherwise that any conveyance was made without consideration, or without a sufficient consideration. The record is plain, and it is not challenged, that the deed of trust of November 25, 1959, was a proper security transaction for an existing liability of Hedin to New Amsterdam; (J.A. 3, 15) and that the conveyance to Abrams was for the full fair market value of the property (J.A. 5, 14, 16).

RULES INVOLVED

Rule 9(b) of the Federal Rules of Civil Procedure:

"Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Rule 58(f) of the Federal Rules of Civil Procedure:

"When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

SUMMARY OF ARGUMENT

I. The District Court was correct in granting summary judgment because the three uncontroverted affidavits submitted by appellees clearly show that no genuine issue of fact exists. Although portions of two of appellees' affidavits use the phrase "information and belief", it is apparent that the affidavits are based upon personal knowledge and were therefore properly received by the District Court. Appellant submitted no affidavits in opposition to the motion for summary judgment and his general allegation that certain conveyances of real property were made to "hinder, defraud and delay" creditors does not raise a genuine factual issue.

II. The District Court properly dismissed the complaint because the undisputed facts show that the conveyances attacked by appellant were made in good faith, without collusion and for the fair market value of the property. These conveyances were part of an effort by a large creditor to collect upon its obligations rather than a scheme to hinder,

delay and defraud creditors. It is not unlawful for a creditor to take proper steps to secure and collect debts due, even though he may thereby diminish the assets available for other creditors such as appellant.

ARGUMENT

I

SUMMARY JUDGMENT WAS PROPERLY GRANTED BECAUSE NO GENUINE ISSUES OF FACT EXIST

Appellant has, in its complaint as originally drawn and twice amended (J.A. 1, 6, 10), based its claim for relief entirely upon the general allegation that the various conveyances were made with the intent to "hinder, delay or defraud creditors." No facts were alleged which would evidence such an intent on the part of the appellees; the words were simply lifted out of the statute, D.C. Code, Sec. 12-401 (1961 Edition), and applied to the conveyances which the appellant asked the Court to set aside.

Appellees, on the other hand, submitted three affidavits which describe in great detail the circumstances of the transaction which appellant seeks to have set aside. Appellant submitted no affidavits in opposition to appellant's motion, nor did it in any way assail the truth and accuracy of the statements contained in appellees' affidavits. This Court and Courts of Appeals in other circuits have consistently held that a "genuine issue of material fact" which would preclude summary judgment cannot be created by mere allegations in a pleading which are controverted by affidavits. Williams v. Kolb, 79 App. D.C. 253, 145 F. 2d 344 (1944); Orvis v. Brickman, 90 U.S. App. D.C. 266, 196 F. 2d 762 (1952); National War Labor Board v. Montgomery Ward & Co., 79 U.S. App. D.C. 200, 144 F. 2d 528 (1944); Lawson v. American Motorists Insurance Corporation, 217 F. 2d 724 (5th Cir. 1954). Williams v. Kolb, *supra*, is particularly in point; it was a suit to set aside a sale under a deed of trust to secure a promissory note executed

by the plaintiff on the ground that the holder of the note was "in fact and in truth the agent, tool and straw" of the trustee. Defendants moved for summary judgment with supporting affidavits; plaintiff relied upon the general allegations in his complaint. Summary judgment for defendants was affirmed, per curiam, the court holding that:

"Such general allegations were not sufficient on a motion for summary judgment to raise an issue of fact against the detailed statements sworn to by the defendants."
79 U.S. App. D.C. 253.

Not having submitted any affidavits upon which a genuine issue of fact could be based, appellant contends that the District Court erred in granting summary judgment because "the record before it contained no proper supporting affidavits." (Br. 10). Although the appellant does not point to the particular portions of the three affidavits, the contention is that the affidavits of Spriggs and Murray were improper because "not based on personal knowledge of the affiants" (Br. 10). This apparently refers to the following language in the affidavits:

Affidavit of Robert J. Murray

"he makes this affidavit on information and belief."

(J.A. 15)

Affidavit of Kahl K. Spriggs

"that on or about the 25th day of November, 1959, affiant is informed and believes and therefore avers that J. D. Hedin Construction Company was indebted to New Amsterdam Casualty Company for large sums of money actually paid by the said New Amsterdam Company, and was further obligated secondarily as surety upon contingent claims being made by sundry people arising out of construction contracts theretofore entered into by the said J. D. Hedin Construction Co.;"

(J.A. 4)

"on said date the said New Amsterdam Casualty Company was further obligated as surety or guarantor to pay additional sums of money for the use and bene-

fit of the said J. D. Hedin Construction Co. arising out of defaults in construction contracts aggregating, according to affiant's information and belief, sums exceeding \$480,000.00;"

(J.A. 4)

Although the affidavits use the words "information and belief", it is apparent from a reading of the statements therein that the close familiarity of both affiants with the transaction described satisfies the policy of Rule 56(e) of the Federal Rules of Civil Procedure. A corporation can "know" a fact only through its officers and employees; Mr. Murray is the Director of the Fidelity and Surety Claim Division of New Amsterdam and his affidavit states at the outset that he is "charged with being informed concerning the matters hereinafter set forth" (J.A. 15). Uncontroverted affidavits which stated that the affiant was "familiar with the facts" rather than using the precise words "personal knowledge" were accepted and provided the basis for a summary judgment which was affirmed in Lawson v. American Motorists Insurance Corp., 217 F. 2d 724 (5th Cir. 1954). Appellant has not directly asserted, with counter-affidavits or even specific allegations, that any of the facts set forth in the affidavits submitted by appellees are not true. To invalidate the affidavits at this stage of the proceedings because of the failure to use a particular form of words would defeat the salutary policy of the summary judgment rule: "to dispose of cases where there is no genuine issue of fact, even though an issue may be raised formally by the pleadings." Battista v. Horton, Myers & Raymond, 76, U.S. App. D.C. 1, 2, 128 F. 2d 29, 30 (1942).

Even if it be conceded, arguendo, that certain statements of the affidavits may not conform to the "personal knowledge" requirement of Rule 56(e), where both competent and incompetent matter appears in the same affidavit it has been held that the trial court may accept the former and disregard the latter, rather than disregard the entire affidavit. Cromwell v. Hillsborough Township, 149 F. 2d 617, 621 (3rd Cir. 1945);

Dickheiser v. Pennsylvania R. Co., 5 F. R. D. 5 (E.D. Pa. 1946), aff'd 155 F. 2d 266 (3rd Cir. 1946). In the affidavit of Kahl K. Spriggs, Esquire, the phrase "information and belief" relates only to the two statements quoted above. In Morris Abrams' affidavit this language does not appear at all.

Abrams' affidavit is dismissed by the appellant as "not pertinent to the main issue involved * * *." (Br. 10). If this is so, then why did appellant allege, in paragraph 5 of its Second Amended Complaint, that the conveyance to Morris and Rose Abrams was made to "hinder, defraud and delay creditors of defendant Hedin" (J.A. 11-12)?

The case cited by appellant in support of its argument that the affidavits were improperly received by the District Court are clearly distinguishable. In Jameson v. Jameson, 85 U.S. App. D.C. 176, 176 F. 2d 58 (1949) (Br. 10), the court, affirming a summary judgment, held that no genuine issue of fact had been created by appellant's affidavit in which he stated that he "verily believed" an informal letter written by a judge of the United States Court for China to be a part of the record in a divorce proceeding. The letter itself and the record of the proceedings in the Court for China clearly showed that the letter was not part of the record, and an affidavit of appellant's contrary belief did not raise a genuine factual issue. A fortiori, where, as here, the opponent of a motion for summary judgment has submitted no affidavits, no factual issue is created.

Appellant, on page 11 of its brief, quotes a dictum from Zampos v. U.S. Smelting Refining and Mining Company, 206 F. 2d 171 (10th Cir. 1953). An examination of the opinion in that case reveals that, immediately following the language quoted by appellant, the Tenth Circuit Court of Appeals made the following statement which formed the basis for affirming the District Court's grant of summary judgment:

"But where the moving party presents affidavits, a deposition, or both, which taken alone would entitle him to a directed verdict, if believed, and which the

opposite party does not discredit as dishonest, it rests upon that party at least to specify some opposing evidence that he can adduce which may reasonably change the result. Radio City Music Hall Corp. v. United States, 2 Cir. 135 F. 2d 715; Gifford v. Travellers Protective Association, 9 Cir., 153."

Appellant also asserts that the summary judgment is ordinarily inappropriate where the question of good faith is an issue (Br. 16-17). In the case cited as authority for this proposition, Dewey v. Clark, 86 U.S. App. D.C. 137, 180 F. 2d 766 (1950), affidavits on the issue of good faith were submitted by both sides. In reversing the lower court's award of summary judgment, the Court of Appeals noted that "the issue of good faith on the part of the landlord is not raised by a mere denial", 86 U.S. App. D.C. 144, 180 F. 2d 773 (emphasis added). The question of good faith in the case at bar is raised by a mere assertion in the complaint, hence this case does not come within the rule of Dewey v. Clark.

Appellant cannot excuse the absence of affidavits in opposition to the motion for summary judgment on the ground that the facts of the conveyances of the Hedin Hotel were within the knowledge of the appellees. The Federal Rules of Civil Procedure provide a remedy for an opponent to a motion for summary judgment who finds himself in such a situation; Rule 56(f) provides:

"When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Appellant's failure to avail himself of this provision of the Rules demonstrates the lack of any genuine fact issue in this case. Nor can appellant argue that the District Court's entry of summary judgment has improperly deprived it of an opportunity to cross-examine appellees'

witnesses. This argument was rejected by this Court in Orvis v. Brickman, 90 U.S. App. D.C. 266, 270, 196 F. 2d 762, 765 (1952) and by the Third Circuit Court of Appeals in United States v. Halpern, 260 F. 2d 590, 591 (1958). In both cases the Court based its holding upon the opponent's failure to utilize the discovery procedures provided for in the Federal Rules.

II.

THE DISTRICT COURT WAS CORRECT IN DISMISSING THE COMPLAINT BECAUSE THE UNCONTROVERTED FACTS SHOW NO BASIS FOR SETTING ASIDE THE CONVEYANCES

Assuming, as this Court must, that the record in this case presents no genuine issues of fact and that summary judgment was therefore proper, it is equally clear that the District Court correctly dismissed the complaint. Contrary to appellant's assertion that appellees "do not deny that the purposes of these conveyances, and the conveyance to Abrams, was to "hinder, delay and defraud plaintiff" (Br. 14), the affidavit of Kahl K. Spriggs expressly denies this intent in the following words:

" * * *. Affiant says that no conveyance of any property was made by him or by said Peter R. Cella, Jr., Esquire, which in any respects was intended to, or in fact did, hinder, delay or defraud any creditor of said J. D. Hedin Construction Co."

In addition, the uncontroverted affidavits of Spriggs, Murray and Abrams show that the entire transaction, from the deed of trust dated November 25, 1959, to the conveyance to the Abrams on October 9, 1961, was a bona fide effort by New Amsterdam to have a lawful security for its liabilities on obligations assumed as surety for Hedin, liabilities which ripened into an actual debt of \$1,250,000.00 by the time New Amsterdam availed itself of the security.

Appellant has cited no cases which support his position that the

conveyances here at issue should be set aside. Holman v. Ryon, 61 U.S. App. D.C. 10, 56 F. 2d 307 (1932) (Br. 14) involved a sale by a trustee under a deed of trust to his own wife for less than half its fair market value. Snider v. Kelley, 77 U.S. App. D.C. 363, 135 F. 2d 817 (1943) (Br. 15) concerned the transfer of real property by a judgment debtor to her brother without consideration. Neither collusion between purchaser and seller nor inadequacy of consideration is even alleged here. The conveyance by Hedin to Spriggs was, in effect, by a debtor to its creditor; and the conveyance by Spriggs to Abrams, was a bona fide sale from seller to purchaser.

Appellant's claim, viewed in the light of the facts set forth in the uncontroverted affidavits, comes down to this: New Amsterdam, acting as a diligent creditor, has succeeded in collecting a small part of the debt owed to it by Hedin; appellant, having failed thus far to collect upon its judgment against Hedin now asks the Court to divide the money which New Amsterdam has managed to collect among all of Hedin's creditors, diligent and otherwise. The fact that one creditor is more successful than others, either by his own diligence or through the debtor's preference, is not grounds for setting aside a conveyance in the absence of a bankruptcy proceeding. Merillat v. Hensey 32 U.S. App. D.C. 64 (1908), affirmed in 221 U.S. 333, 341, 31 Sup. Ct. 575, 55 L. ed 758, 761 (1911). The sole remedy of a creditor in the position of appellant, who finds himself the loser in a race of diligence, is under the bankruptcy law; see, especially, the section on "Voidable Preference", 11 U.S.C.A. Sec. 96(b).

CONCLUSION

Appellees, in summary, contend that they have in the court below made available all the facts there are necessary to a determination of the case; and they contend these facts demonstrate that they are entitled to judgment. If there is any fact controverted, appellant has

not identified it. If, these being the facts, there is any just reason why appellant should prevail, his counsel has not presented it. Accordingly, appellees assert the judgment below should be affirmed.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,136

F. S. BOWEN ELECTRIC CO., INC.,

Appellant,

v.

J. D. HEDIN CONSTRUCTION CO., INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED

OCT 12 1962

Joseph W. Stewart

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(i)

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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REPLY BRIEF FOR APPELLANT

Appellees' Brief attempts to answer points raised by appellant in imaginative and creative fashion. Appellant's first point is sought to be answered by adding to the defective affidavits the missing ingredient. Appellant's second point is sought to be answered by omitting from the discussion the very conveyances challenged as fraudulent.

I. DEFECTS IN SUPPORTING AFFIDAVITS OF MOTIONS FOR SUMMARY JUDGMENT CANNOT BE CURED BY ASSERTIONS OF COUNSEL (UNVERIFIED) IN APPELLATE BRIEF.

The affidavits of appellee Spriggs and of Murray clearly do not meet the requirements of Rule 56 (e) for supporting affidavits of motions for summary judgment as they are not based on personal knowledge. Appellant's counsel now seeks to remedy this defect by assuring the Court that "the close familiarity of both affiants with the transaction described satisfies the policy of Rule 56 (e)" (Appellees' Brief, p. 8).

The impropriety and tardiness of the "assurance" is obvious. When the affidavits were first challenged, prior to argument on the motion for summary judgment (J.A. 23-24), appellees-defendants did nothing to cure the defect. Of course, if the defect could have been cured, it would have been simple to do so at that time by another affiant. It cannot now be cured by unverified assertions of counsel in a brief on appeal.

The affidavits are carefully, even artfully, drawn to fully exploit the most the affiants can say for their clients. It is also clear from the affidavits that affiants could not make the statements contained therein from personal knowledge.

Affiant Murray is quite specific. His affidavit states, as a preface to all the statements contained therein except his name, address and employment, that the affidavit is "from an examination of the records and claims of the said New Amsterdam Casualty Company, he makes this affidavit on information and belief" (J.A. 15). The source of his information is identified. There is no suggestion of personal knowledge. The affidavit clearly cannot be considered as a proper one in supporting the motion for summary judgment.

Appellee Spriggs, the other affiant, is described elsewhere in the brief as "an outstanding and distinguished member of this bar." Presented with this endorsement, it surely would not be inappropriate for the Court to assume (what is undoubtedly the fact) that Mr. Spriggs is quite cognizant

of the requirements of Rule 56 and knows the difference between personal knowledge and information and belief. No attorney of Mr. Spriggs' long experience at the bar makes an affidavit to support a motion for summary judgment on "information and belief" when he is able to do so on personal knowledge. If Mr. Spriggs had been able to cure the defect in the affidavit, he certainly would have done so when the objection to the affidavit was made prior to argument on the motion for summary judgment in the court below (J.A. 23). He did not do so for the obvious reason that he could not.

Furthermore, when the Spriggs affidavit is examined, it will be seen that nearly all of the statements contained therein are those with which Mr. Spriggs would not be expected to have any familiarity. How would he be familiar with the amount of money owed by Hedin Construction Co. to New Amsterdam Casualty Co.? How would he know the disposition of the proceeds of a loan made by the Equitable Trust Co. of Baltimore? How would he have personal knowledge of the amount which New Amsterdam Casualty Co. had expended or contracted to expend on behalf of Hedin Construction Co.? Mr. Spriggs is represented to the Court as an attorney, not as a person engaged in the surety business.

Furthermore, familiarity cannot take the place of personal knowledge. The authority cited by appellees, Lawson v. American Motorists Insurance Corporation, 217 F. 2d 724 (5 Cir. 1954), does not support the proposition. That court simply held that, in the absence of objection, the affiant need not say that he had "personal knowledge" when he made other equivalent statements.¹ In the instant case, objection was made in the court below prior to argument, at the argument, and is one of the points on appeal. And affiants made no "equivalent" statements. Thus, the situations are quite different.

¹ "One of these affidavits recited that the affiant was 'familiar with the facts *** and the facts and allegations, and each and every one of them ***', are true and correct.' The other affidavit stated that the affiant was 'fully cognizant of the facts herein set out, and says that the statements and facts *** are in all things true and correct.'" (217 F. 2d at 726).

The courts have uniformly held that affidavits such as those of Spriggs and Murray, not based on personal knowledge, must be disregarded on a motion for summary judgment. (Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc., 339 U.S. 827, 931 (1940); Boucher v. Travelers & General Insurance Co., 235 F. 2d 423 (5 Cir. 1956); State of Washington v. Maricopa County, 143 F. 2d 871 (9 Cir. 1944); Veeder-Root, Inc. v. Henrietta, 52 F. Supp. 918, 919 (D. Conn. 1943); Barron and Holtzoff, Federal Practice and Procedure (Rules Edition), Vol. 3, pp. 164-165.) Appellant was not required to answer improper supporting affidavits. These affidavits cannot be the basis of denying plaintiff his right to trial on the allegations made in the complaint.

II. APPELLEES' CONTENTION THAT THE CHALLENGED CONVEYANCES WERE MADE IN GOOD FAITH FINDS ABSOLUTELY NO SUPPORT IN THE RECORD

Appellees assert that the conveyances challenged by the complaint herein were made in good faith and without collusion. But there is nothing in the record to support the assertion. Actually, many of the supporting "facts" recited in Appellees' Brief are pure fiction. The following are two examples:

Item:

"The defendants have all answered, and have denied that the conveyances were fraudulent in any way."
(J.A. 3, 13-17).

(Appellees' Brief, page 2)

No defendant has answered. No answer has been filed in this case. Specifically, appellees J. D. Hedin Construction Co., Inc. and New Amsterdam Casualty Co., who are charged with having made and benefited by the fraudulent conveyances, have not answered.

Furthermore, none of the supporting affidavits deny that the conveyances of April 27, 1961 and July 27, 1961 were made to hinder, delay or defraud plaintiff and were fraudulent. In fact, the affidavits pointedly

ignore mentioning these conveyances. Affiant Spriggs says that no conveyance of any property was made by him or by Cella "which in any respects was intended to or in fact did hinder, delay or defraud any creditor" (J.A. 6). Spriggs does not deny that the conveyances to him and to Cella were for that purpose. Interestingly he admits that the conveyances made by him were done "with the authority and at the direction of the said New Amsterdam Casualty Company" (J.A. 4). His client's intention is not disclosed.

Affiant Abrams, the only other appellee to file an affidavit, simply stated that he had no intention to defraud any creditors. He was not able to and did not reveal the intention and purpose of New Amsterdam Casualty Co.

Item:

"Prior to November 25, 1959, New Amsterdam Casualty Company . . . had procured to secure itself a conveyance of Hedin House to trustees for its benefit (J.A. 4, 15). This deed of trust was exhibited to the Court (J.A. 15). The title remained in Hedin, subject to this deed of trust, and subject to numerous other liens and encumbrances, until October, 1961, when a sale of the property was negotiated to Morris Abrams, . . ."

(Emphasis supplied)

(Appellees' Brief, page 3)

The foregoing is not true. Title to Hedin House was not in Hedin from November 1959 to October 1961.

The statement is doubly misleading. First, it omits mentioning the conveyances of April 27, 1961 and July 27, 1961 from J. D. Hedin Construction Co. to appellees Spriggs and Cella of the fee simple title to Hedin House. These are the basic conveyances challenged in the complaint. Despite appellees' efforts to exclude them from the case, they will not disappear. They demonstrate that the title was not in Hedin from November 25, 1951 until October 1961.

In addition, the foregoing quotation infers that the conveyance to Abrams in October 1961 was pursuant to the deed of trust. It was not. The deed of trust, of course, is not in the record but the Court can take judicial notice that a private sale to Abrams does not comply with the terms of the usual deed of trust.

- o -

The picture presented to the Court of a creditor successfully collecting its debt because of its diligence finds no support in the record. If the picture were true, why has appellee J. D. Hedin Construction Co., Inc. not answered the complaint or even filed an affidavit through one of its officers? If the picture were true, why has New Amsterdam Casualty Co. not denied the charge through Answer or affidavit or otherwise than in a brief on appeal?

Uncontroverted matters of public record paint a completely different picture. Plaintiff obtained judgment against J.D. Hedin Construction Co., Inc. on November 24, 1958. The case was appealed and on October 8, 1959, this Court issued its opinion remanding the case.²

Shortly after this Court's opinion on November 25, 1959, Hedin Construction Co., the judgment debtor, made a deed of trust of its valuable real estate to New Amsterdam Casualty Co. (Liber 11359, Folio 554). The case was remanded by this Court and nothing further was done by New Amsterdam Casualty Co., "the diligent creditor", until after the Master's Report filed in January 1961 recommending that plaintiff receive a larger judgment. Then in April and July, 1961, J.D. Hedin Construction Co., Inc. conveyed the fee simple of the property to attorneys for New Amsterdam Casualty Co. (Liber 11590, Folio 73; Liber 11636, Folio 171; Liber 11640, Folio 96). In October 1961, a few days before the second judgment was entered, the property was converted to cash (Instrument No. 31760).

² Petition for rehearing was filed, the opinion amended, and the mandate went down in January 1960.

The foregoing dates and conveyances are matters of public record of which there can be no dispute. Basically, what plaintiff is charging and what defendants have not denied is that the conveyances from Hedin Construction Co. to Spriggs and Cella were made to hinder, delay or defraud plaintiff from collecting its judgment and that the conversion of the property to cash in the sale to Abrams was for the same purpose. A mere recital of the foregoing undisputed facts shows that New Amsterdam Casualty Co., the beneficiary of the various conveyances, was at least trying to hinder and delay appellant. That alone is sufficient under the statute to make the conveyances fraudulent and void as to appellant.

The question on this appeal is not whether the allegations are correct, but simply whether appellees are required to answer the allegations and let a court determine whether the conveyances were in fact made to hinder, delay or defraud plaintiff. Thus far, appellees have chosen not to answer the allegations.

CONCLUSION

In view of the foregoing and for the reasons cited in appellant's brief, the decision of the District Court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

MICHAEL A. SCHUCHAT

231 Tower Building
Washington 5, D. C.

Attorney for Appellant.

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,136

F. S. BOWEN ELECTRIC CO., INC.,

Appellant,

v.

J. D. HEDIN CONSTRUCTION CO., INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 2 1962

Joseph W. Stewart

CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,136

F. S. BOWEN ELECTRIC CO., INC.,

Appellant,

v.,

J. D. HEDIN CONSTRUCTION CO., INC., et al.,

Appellees.

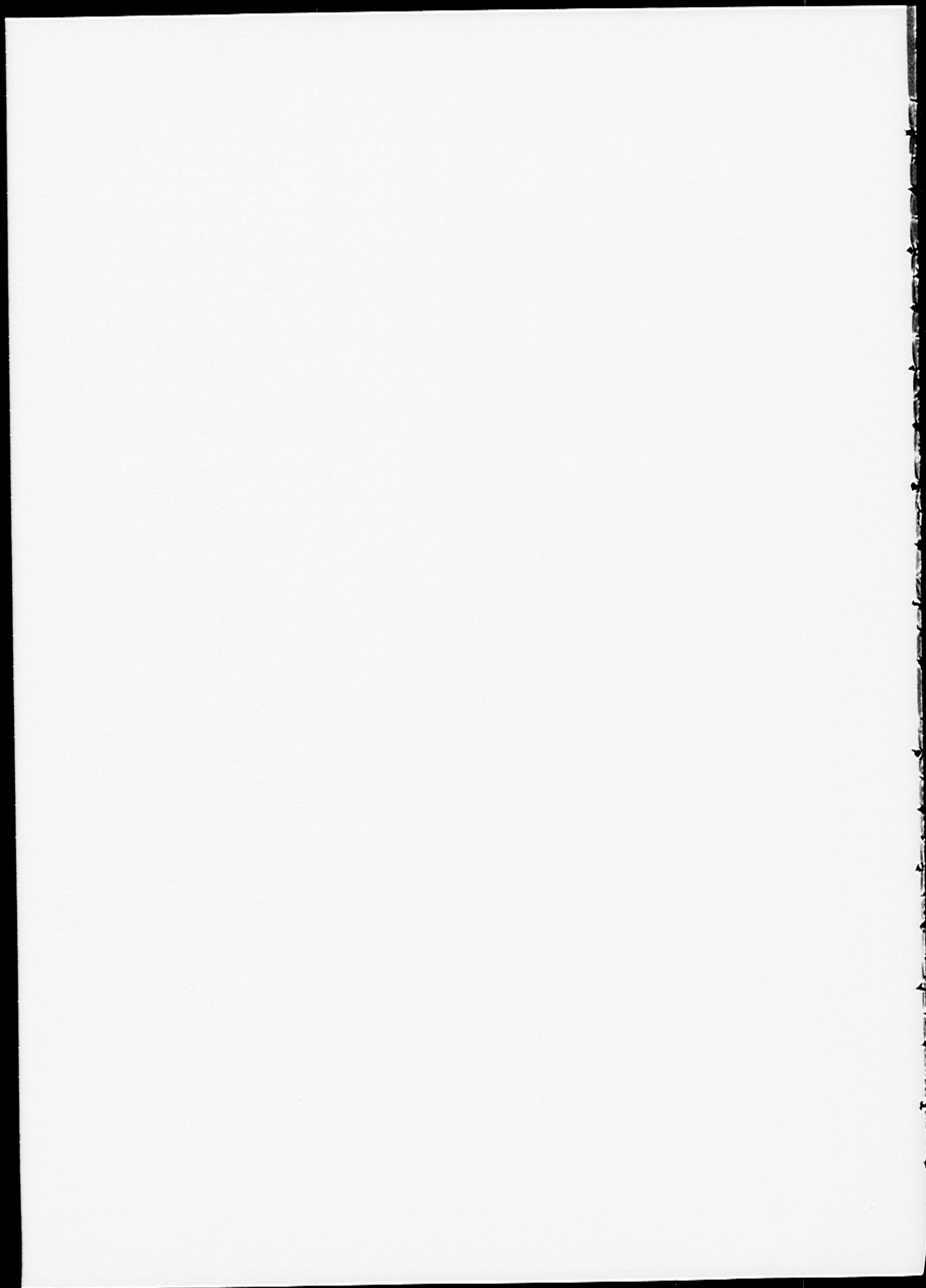
APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

(i)

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JOINT APPENDIX

[Filed Oct. 26, 1961]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

F. S. BOWEN ELECTRIC CO., INC.,
Enterprise Road,
Mitchellville, Maryland,

Plaintiff,

v.

J. D. HEDIN CONSTRUCTION CO., INC.
2900 Newton St., N.E.,
Washington, D. C.

SERVE: Prentice-Hall, Inc.,
941 Munsey Building
Washington, D. C.

PETER R. CELLA, JR.,
1215 19th St., N.W.,
Washington, D. C.

KAHL K. SPRIGGS,
Southern Building,
Washington, D.C.,

Defendants.

CIVIL ACTION No. 3546-61

COMPLAINT TO SET ASIDE
FRAUDULENT CONVEYANCES OF REALTY

1. Jurisdiction is invoked under 11 D. C. Code § 305. The amount in controversy, not including interest and costs, exceeds \$3,000.00.

2. Plaintiff corporation is an electrical contractor and was a subcontractor of defendant J.D. Hedin Construction Co., Inc., hereinafter referred to as Hedin. As a result of Hedin's breach of said contract, plaintiff brought suit against defendant Hedin in this Court in Civil Action No. 717-57. Said action resulted in a judgment for plaintiff of \$30,000.00 entered November 24, 1958.

Subsequently the case was appealed and the United States Court of

Appeals for the District of Columbia Circuit remanded to reassess the awarded damages. In June 1960, on remand, said action was referred to a Special Master pursuant to Rule 53. Said Special Master found in January 1961 that plaintiff was entitled to judgment in the amount of \$34,151.86 with interest from November 24, 1958. On October 24, 1961, said findings of fact and conclusions of law were sustained by the Hon. Edward M. Curran, United States District Judge, in a judgment entered in this Court.

3. One of the principal assets, if not the only asset, of defendant Hedin is a valuable piece of real estate in the District of Columbia located at 2900-2902 Newton St., N.E., a hotel known as Hedin House, also known as Lot 801, Square 4307 in the Land Records of the District of Columbia.

4. Complaining of defendants, plaintiff says that in order to hinder, defraud and delay plaintiff and other creditors, defendants caused said real estate to be conveyed on April 27, 1961, to Peter R. Cella, Jr., and on July 27, 1961, to Kahl K. Spriggs. Said transfers were fraudulent and should be set aside by this Court.

WHEREFORE, plaintiff prays that this Court set aside as fraudulent conveyances the transfer of Lot 801, Square 4307, to Peter R. Cella, Jr. on April 27, 1961 and to Kahl K. Spriggs on July 27, 1961; that a receiver be appointed to conserve the assets of defendant Hedin for the benefit of plaintiff and all other creditors; and for such other and further relief as to this Court seems just and proper.

/s/ Michael A. Schuchat,
Attorney for Plaintiff,
231 Tower Building,
Washington 5, D. C.

[Filed Nov. 27, 1961]

MOTION FOR SUMMARY JUDGMENT

Come now the defendants Peter R. Cella, Jr. and Kahl K. Spriggs, by Jackson and Gray, their attorneys, and move this Honorable Court for summary judgment herein dismissing this action as to them, and for grounds therefor say that the property described in said Complaint, the transfer of which is alleged to have been in fraud of creditors, was conveyed to a bona fide purchaser prior to the filing of this action, as set forth in the affidavit of Kahl K. Spriggs, Esq., annexed hereto and prayed to be read as a part hereof.

JACKSON AND GRAY

By: /s/ Thomas S. Jackson
Attorneys for Defendants
Peter R. Cella, Jr. and Kahl K. Spriggs
1025 Connecticut Avenue, N. W.
Washington, D. C.

[Filed November 27, 1961]

AFFIDAVIT OF KAHL K. SPRIGGS
IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

DISTRICT OF COLUMBIA, ss:

KAHL K. SPRIGGS, upon oath deposes and says that he is the defendant named in the above-entitled action; that he has read the Complaint and knows the contents thereof; that he is a member of the Bar of this Honorable Court and in all matters in said Complaint alleged and herein referred to he acted as attorney for New Amsterdam Casualty Company, and as its agent and trustee; that, as such attorney, agent and trustee he had no beneficial interest in any property described in the Complaint and makes no claim thereto, but merely acted, as did also the said Peter R. Cella, Jr. (also a member of the Bar of this Honorable Court, also without any personal interest in any of the transactions here involved

- 2 and only used because at all times hereinafter described he was unmarried) merely as a vehicle of title; that on or about the 25th day of November, 1959, affiant is informed and believes and therefore avers that J. D. Hedin Construction Co. was indebted to New Amsterdam Casualty Company for large sums of money actually paid by the said New Amsterdam Casualty Company, and was further obligated secondarily as surety upon contingent claims being made by sundry people arising out of construction contracts theretofore entered into by the said J. D. Hedin Construction Co.; that, on said day, to secure the said New Amsterdam Casualty Company the said J. D. Hedin Construction Co. executed and delivered a certain deed of trust bearing date the 25th day of November, 1959, and recorded on December 28, 1959, among the land records of the District of Columbia in Liber No. 11359 at Folio 455, by which the said grantor conveyed to affiant and David B. Nicholson (an associate of affiant in the practice of law) as trustees, certain property, more fully described therein, but being the property described in the Complaint in this Civil Action No. 3546-61; that on the 9th day of October, 1961, the said J. D. Hedin Construction Co. was still indebted to the New Amsterdam Casualty Company, and that the amount of said debt exceeded \$800,000.00 in money actually paid out by it in discharge, or partial discharge, of its obligations as surety for the said J. D. Hedin Construction Co. on the sundry contracts and obligations hereinabove referred to, and on said date the said New Amsterdam Casualty Company was further obligated as surety or guarantor to pay additional sums of money for the use and benefit of the said J. D. Hedin Construction Co. arising out of defaults in construction contracts aggregating, according to affiant's information and belief, sums exceeding \$480,000.00; that his
- 3 said client and principal desired to convert to cash the security represented by the property described in the Complaint, and the subject of the aforesaid deed of trust dated November 25, 1959, and affiant, with the authority and at the direction of the said New Amsterdam Casualty Company, conveyed said property pursuant to a contract theretofore

made, to Morris Abrams and Rose D. Abrams, his wife, as tenants by the entirety, by deed dated October 4, 1961 and recorded among the land records of the District of Columbia as Instrument No. 31760 on October 17, 1961, for the sum of \$400,000.00 which sum was the fair market value of said property, and the same was paid by the purchasers at a settlement held on the 9th day of October, 1961, at Realty Title Insurance Company, Inc., 1424 K Street, N. W., Washington, D. C., as follows: A commission to real estate agent of \$18,750.00; a credit of \$25,000.00 for the use by J. D. Hedin Construction Co. of a portion of the premises for a period of three years, pursuant to the contract of sale; the discharge of a first deed of trust which had secured the Perpetual Building Association for a debt of \$131,552.95, and interest thereon amounting to \$365.46; water rent, \$100.00; taxes for the years 1961 and the first half of 1962, \$14,333.04, less an adjustment credit of \$2,092.12; and sundry other adjustments and charges in connection with the real estate transfers amounting to \$481.00, leaving a balance in cash of \$211,509.67, all of which said balance was paid over to affiant by the check of said Realty Title Insurance Company, Inc. and by affiant promptly thereafter, and before the filing of this suit, accounted for and paid over to the New Amsterdam Casualty Company, affiant's client and principal, as aforesaid; that all of the transactions hereinabove described were in good faith, carried out with the sole purpose of bringing about a partial payment to the New Amsterdam Casualty Company of monies due it by

4 the said J. D. Hedin Construction Co. and the sale of said property was, as affiant is informed and believes, for a fair consideration, representing the true market value thereof, which said true market value was far less than the outstanding liens existing thereon, including judgment liens junior to the liens of New Amsterdam Casualty Company, so that as of the date of said conveyance in October, 1961, the said J. D. Hedin Construction Co. had no equity whatever in the property described in the Complaint, i.e., the aggregate of all liens was greater than the fair market value of the property as represented by the sale price aforesaid;

by reason whereof affiant says that no conveyance of any property was made by him or by said Peter R. Cella, Jr., Esquire, which in any respects was intended to, or in fact did, hinder, delay or defraud any creditor of said J. D. Hedin Construction Co.

/s/ KAHL K. SPRIGGS

Subscribed and sworn to before me this 24th day of November, 1961.

/s/ Notary Public, D. C.

[Filed Dec. 12, 1961]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

F. S. BOWEN ELECTRIC CO., INC.,
Enterprise Road,
Mitchellville, Maryland,

Plaintiff,

v.

J. D. HEDIN CONSTRUCTION CO., INC.,
2900 Newton St., N.E.,
Washington, D. C.

PETER R. CELLA, JR.,
1215 19th St., N. W.,
Washington, D. C.

KAHL K. SPRIGGS,
Southern Building
Washington, D. C.

DAVID B. NICHOLSON,
Southern Building,
Washington, D. C.

NEW AMSTERDAM CASUALTY CO.,
Woodward Building,
Washington, D. C.,

Defendants.

Civil Action No. 3546-61

*Let this be filed
E MC*

AMENDED COMPLAINT TO SET ASIDE FRAUDULENT
CONVEYANCES OF REALTY AND FOR OTHER RELIEF

1. Jurisdiction is invoked under 11 D.C. Code §305. The amount

in controversy, not including interest and costs, exceeds \$3,000.00.

2. Plaintiff corporation is an electrical contractor and was a subcontractor of defendant J. D. Hedin Construction Co., Inc., hereinafter referred to as Hedin. As a result of Hedin's breach of said contract, plaintiff brought suit against defendant Hedin in this Court in Civil Action No. 717-57. Said action resulted in a judgment for plaintiff of \$30,000.00 entered November 24, 1958.

Subsequently the case was appealed and the United States Court of Appeals for the District of Columbia Circuit remanded to reassess the awarded damages. In June 1960, on remand, said action was referred to a Special Master pursuant to Rule 53. Said Special Master found in 2 January 1961 that plaintiff was entitled to judgment in the amount of \$34,151.86 with interest from November 24, 1958. On October 24, 1961, said findings of fact and conclusions of law were sustained by the Hon. Edward M. Curran, United States District Judge, in a judgment entered in this Court.

3. One of the principal assets, if not the only asset, of defendant Hedin is a valuable piece of real estate in the District of Columbia located at 2900-2902 Newton St., N.E., a hotel known as Hedin House, also known as Lot 801, Square 4307 in the Land Records of the District of Columbia.

4. Complaining of defendants, plaintiff says that in order to hinder, defraud and delay plaintiff and other creditors, defendants caused said real estate to be conveyed on April 27, 1961, to Peter R. Cella, Jr., and on July 27, 1961, to Kahl K. Spriggs and David B. Nicholson. Said transfers were fraudulent and should be adjudged fraudulent by this Court.

5. On or about October 17, 1961, defendants Spriggs and Nicholson transferred the aforementioned real property to one Morris Abrams and Rose Abrams in order to convert said property to cash and to further hinder, defraud and delay creditors of defendant Hedin. As a result of said transfer, defendant Spriggs received approximately \$211,509.67 which purportedly represented the equity of defendant Hedin in said property.

6. On or about the time the original complaint in this suit was

filed, defendants Spriggs and Nicholson transferred the equity in the form of the aforesaid \$211,509.67 to the New Amsterdam Casualty Co. for its own separate use and benefit in order to further hinder, delay and defraud creditors of defendant Hedin.

WHEREFORE, plaintiff prays that this Court adjudge the transfers of Lot 301, Square 4307 to Peter R. Cella, Jr. on April 27, 1961 and to Kahl K. Spriggs and David B. Nicholson on July 27, 1961 as fraudulent conveyances; that defendants be required to pay the amount received for said property into this Court to be disbursed as this Court shall direct;
 3 that a receiver be appointed to conserve the assets of defendant Hedin for the benefit of plaintiff and all other creditors; and for such other and further relief as to this Court seems just and proper.

/s/ Michael A. Schuchat,
 Attorney for Plaintiff,
 231 Tower Building,
 Washington 5, D. C.

[Certificate of Service]

[Filed Dec. 18, 1961]

MOTION FOR SUMMARY JUDGMENT

Come now the defendants, PETER R. CELLA, JR., KAHL K. SPRIGGS, DAVID B. NICHOLSON and NEW AMSTERDAM CASUALTY CO., through counsel, and move this Honorable Court for a summary judgment in their favor upon the Amended Complaint filed herein, and as grounds therefor respectfully invite the attention of the Court to the Motion for Summary Judgment upon the original Complaint filed herein on November 27, 1961, and the Affidavit and Memorandum filed in support thereof.

JACKSON AND GRAY

By: /s/ Thomas S. Jackson
 Attorneys for Defendants,
 Peter R. Cella, Jr., Kahl K. Spriggs,
 David B. Nicholson and New Amsterdam
 Casualty Co.,

* * *

[Certificate of Service]

[Filed Dec. 20, 1961]

**STATEMENT OF GENUINE ISSUES PER
LOCAL RULE 9(b)**

The following are some of the genuine issues in this case:

1. Whether the conveyance to New Amsterdam Casualty Company on November 25, 1959, was made to hinder, defraud or delay the other creditors of J. D. Hedin Construction Co., Inc.
2. Whether the conveyance to Morris and Rose D. Abrams dated October 4, 1961, was made to hinder, delay or defraud creditors and whether the transferees thereof are bona fide purchasers for value.
3. Whether J. D. Hedin Construction Co., Inc. was indebted to New Amsterdam Casualty Company at the time of the foregoing transfers and whether New Amsterdam Casualty Company is entitled to preferential right to the assets of J. D. Hedin Construction Co., Inc.
4. Whether J.D. Hedin Construction Co., Inc. was at the dates pertinent to this case insolvent.

/s/ Michael A. Schuchat,
Attorney for Plaintiff,
* * *

[Certificate of Service]

[Filed Feb. 20, 1962]

ORDER DISMISSING COMPLAINT

Upon consideration of the motion of defendants for a summary judgment dismissing the complaint and amended complaint, and it appearing to the Court that said motions are well-taken for the reason, among others, that indispensable parties are not named as defendants, it is by the Court this 20 day of February, 1962,

ADJUDGED and ORDERED that the motions of defendants for summary judgment dismissing the complaint and amended complaint be and they are hereby granted and said complaint and amended complaint

be and they are hereby dismissed, with leave to plaintiff to file herein
a second amended complaint if it is so advised.

/s/ Edward M. Curran
JUDGE

[Certificate of Service]

[Filed Feb. 23, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

F. S. BOWEN ELECTRIC CO., INC.,
Enterprise Road,
Mitchellville, Maryland

Plaintiff,

v.

Civil Action No. 3546-61

J. D. HEDIN CONSTRUCTION CO., INC.,
2900 Newton St., N. E.
Washington, D. C.

PETER R. CELLA, JR.,
1215 19th St., N. W.
Washington, D. C.

KAHL K. SPRIGGS,
Southern Building,
Washington, D. C.

DAVID B. NICHOLSON,
Southern Building,
Washington, D. C.

NEW AMSTERDAM CASUALTY CO.,
Woodward Building,
Washington, D. C.,

MORRIS ABRAMS,
3564 Brandywine St., N. W.,
Washington, D. C.

ROSE ABRAMS,
3564 Brandywine St., N. W.,
Washington, D. C.

Defendants.

**SECOND AMENDED COMPLAINT TO SET ASIDE FRAUDULENT
CONVEYANCES OF REALTY AND FOR OTHER RELIEF**

1. Jurisdiction is invoked under 11 D.C. Code § 305. The amount in controversy, not including interest and costs, exceeds \$3,000.00.

2. Plaintiff corporation is an electrical contractor and was a sub-contractor of defendant J.D. Hedin Construction Co., Inc., hereinafter referred to as Hedin. As a result of Hedin's breach of said contract, plaintiff brought suit against defendant Hedin in this Court in Civil Action No. 717-57. Said action resulted in a judgment for plaintiff of \$30,000.00 entered November 24, 1958.

Subsequently the case was appealed and the United States Court of Appeals for the District of Columbia Circuit remanded to reassess the awarded damages. In June 1960, on remand, said action was referred to a Special Master pursuant to Rule 53. Said Special Master found in January 1961 that plaintiff was entitled to judgment in the amount of \$34,151.86 with interest from November 24, 1958. On October 24, 1961, said findings of fact and conclusions of law were sustained by the Hon. Edward M. Curran, United States District Judge, in a judgment entered in this Court.

3. One of the principal assets, if not the only asset, of defendant Hedin is a valuable piece of real estate in the District of Columbia located at 2900-2902 Newton St., N.E., a hotel known as Hedin House, also known as Lot 801, Square 4307 in the Land Records of the District of Columbia.

4. Complaining of defendants, plaintiff says that in order to hinder, defraud and delay plaintiff and other creditors, defendants caused said real estate to be conveyed on April 27, 1961, to Peter R. Cella, Jr., and on July 27, 1961, to Kahl K. Spriggs and David B. Nicholson. Said transfers were fraudulent and should be adjudged fraudulent by this Court.

5. On or about October 17, 1961, defendants Spriggs and Nicholson transferred the aforementioned real property to one Morris Abrams and Rose Abrams in order to convert said property to cash and to further

hinder, defraud and delay creditors of defendant Hedin. As a result of said transfer, defendant Spriggs received approximately \$211,509.67 which purportedly represented the equity of defendant Hedin in said property.

6. On or about the time the original complaint in this suit was filed, defendants Spriggs and Nicholson transferred the equity in the form of the aforesaid \$211,509.67 to the New Amsterdam Casualty Co. for its own separate use and benefit in order to further hinder, delay and defraud creditors of defendant Hedin.

WHEREFORE, plaintiff prays that this Court adjudge the transfers of Lot 301, Square 4307 to Peter R. Cella, Jr. on April 27, 1961 and to Kahl K. Spriggs and David B. Nicholson on July 27, 1961 as fraudulent conveyances; that defendants be required to pay the amount received for said property into this Court to be disbursed as this Court shall direct; that a receiver be appointed to conserve the assets of defendant Hedin for the benefit of plaintiff and all other creditors; and for such other and further relief as to this Court seems just and proper.

/s/ Michael A. Schuchat
Attorney for Plaintiff,
231 Tower Building,
Washington 5, D. C.

[Certificate of Service]

[Filed April 2, 1962]

**MOTION TO DISMISS ON BEHALF OF DEFENDANTS
MORRIS ABRAMS AND ROSE ABRAMS**

Come now Morris Abrams and Rose Abrams, defendants herein, by their attorneys, and move this Honorable Court to dismiss the Second Amended Complaint herein as to them, and for grounds therefor say that the Complaint states no claim against them for which the relief prayed may be granted.

JACKSON AND GRAY

/s/ Thomas S. Jackson
Attorneys for Defendants
Morris Abrams and Rose Abrams,
1025 Connecticut Avenue, N.W.
Washington, D. C.

Certificate of Service: * * *

[Filed April 2, 1962]

MOTION OF ALL DEFENDANTS FOR SUMMARY JUDGMENT

Come now the defendants, by their attorneys, and move this Honorable Court for a summary judgment dismissing the Second Amended Complaint herein and for grounds therefor say that in the absence of any showing of facts contrary to those set forth in the affidavit of Kahl K. Spriggs dated November 25, 1961, filed herein, and the affidavits of Robert J. Murray and Morris Abrams filed herewith, there is no issue of law or fact in this cause nor is there any showing of any right on the part of plaintiff to the relief prayed.

JACKSON AND GRAY

/s/ Thomas S. Jackson
Attorneys for Defendants
* * *

Certificate of Service: * * *

[Filed April 2, 1962]

AFFIDAVIT OF MORRIS ABRAMS

DISTRICT OF COLUMBIA, ss:

MORRIS ABRAMS, being first duly sworn on oath deposes and says that he is the party named as defendant in the above-entitled action; that the defendant Rose Abrams is his wife; that he is a member of the Bar of this Honorable Court and is engaged in the practice of law in the District of Columbia; that on or about the 9th day of October, 1961, as a personal investment, he and his wife acquired the property known as Hedin House, a building situated on Lots 21-25 in Square 4307 in Harry A. Kite's Subdivision as per plat recorded in Liber 82, Folio 10 of the records of the Office of the Surveyor of the District of Columbia for a consideration of Four Hundred Thousand Dollars (\$400,000.00), which said consideration, subject to sundry credits and adjustments, was deposited in cash with Realty Title Insurance Company, Inc. at 1424 K Street, N.W., and in consideration of which affiant and his wife received from Kahl K. Spriggs a conveyance of said property; that the consideration paid was the result of a negotiation at arms-length between affiant and Weaver Bros. Inc., acting as agent for the said Kahl K. Spriggs and was the fair market value of the property, so far as he knows, and as he then and now believes; that said consideration was paid without in any way intending to defraud any creditors of J. D. Hedin Construction Company, Inc. or any other person and without collusion with anyone for any such purpose; that affiant and his wife hold title to said property for and on behalf of themselves and themselves only, as a personal investment; by reason whereof, affiant says that he has authorized the filing herein, on his behalf and on behalf of his wife, of a motion for summary judgment for the purpose of causing dismissal of the Second Amended Complaint as to himself and his wife.

/s/ MORRIS ABRAMS

[JURAT dated March 27, 1962]

[Filed April 2, 1962]

AFFIDAVIT OF ROBERT J. MURRAY

DISTRICT OF COLUMBIA, ss:

ROBERT J. MURRAY, being first duly sworn on oath deposes and says that he is Director of the Fidelity and Surety Claim Division of New Amsterdam Casualty Company, the principal office of which is at 227 St. Paul Street, Baltimore, Maryland; that in his capacity aforesaid he is charged with being informed concerning the matters hereinafter set forth; that, from an examination of the records and correspondence of said New Amsterdam Casualty Company, he makes this affidavit on information and belief; that prior to November 25, 1959, New Amsterdam Casualty Company was lawfully engaged in the business of a fidelity and surety company and had theretofore issued sundry contractors' performance and payment bonds as surety for J. D. Hedin Construction Company, Inc. as principal, being the bonds described in a certain Deed of Trust dated the 25th day of November, 1959, by and between J. D. Hedin Construction Company, Inc., a Delaware corporation, as party of the first part, and Kahl K. Spriggs and David B. Nicholson, as parties of the second part, recorded among the Land Records of the District of Columbia in Liber 11359 at Folio 554, the original or true copy of which will be exhibited to the Court on the hearing of the motion for summary judgment in support of which this affidavit is executed; that said New Amsterdam Casualty Company had guaranteed a loan by the Equitable Trust Company of Baltimore in the principal sum of Four Hundred Eighty Thousand Dollars (\$480,000.00), the proceeds of which were used to discharge indebtedness arising out of contracts for which said New Amsterdam Casualty Company as surety had executed the performance and payment bonds for J. D. Hedin Construction Company, Inc., as aforesaid; that said Deed of Trust aforesaid was executed and delivered by J. D. Hedin Construction Company, Inc. to Kahl K. Spriggs and David B. Nicholson, as trustees, for the purpose of securing New Amsterdam Casualty Company with respect to the aforesaid guarantee

of a promissory note and sundry other liability and debts of the said J. D. Hedin Construction Company, Inc. to New Amsterdam Casualty Company as recited therein; that said Kahl K. Spriggs and David B. Nicholson were then attorneys for said New Amsterdam Casualty Company, they being attorneys at law engaged in the practice of law in the District of Columbia and respected and able members of the bar of this Honorable Court; that at the time aforesaid or thereafter and prior to the 9th day of October, 1961, New Amsterdam Casualty Company had laid out and expended, or had contracted to lay out and expend, in response to its obligations as surety for the said J. D. Hedin Construction Company, Inc. more than one million dollars (\$1,000,000.00), and the records of the company show as of the date of this affidavit an aggregate indebtedness of said J. D. Hedin Construction Company, Inc. to New Amsterdam Casualty Company of more than \$1,250,000.00; that affiant has read the affidavit of Kahl K. Spriggs, Esq., dated November 25, 1961, and filed herein, and knows the contents thereof and believes the same to be true; that the said Kahl K. Spriggs and David B. Nicholson conveyed the property aforesaid to Peter R. Cella, Jr., who also held mere title as trustee as security for the indebtedness of the said J. D. Hedin Construction Company, Inc. to New Amsterdam Casualty Company, and merely as an accommodation; that the state of the title to the said property as of July 22, 1961, was as is set forth in the copy of the report of the Real Estate and Columbia Title Insurance Companies on said date annexed hereto and made part hereof as Exhibit "A" to this affidavit, which was substantially the state of the title as of the date of the Deed of Trust hereinabove described; that the sale of the property to Morris Abrams and Rose Abrams effected in October, 1961, was a bona fide sale, negotiated at arms-length and was the fair market value of the property at that time, so far as is known to New Amsterdam Casualty Company; that said transaction was made solely for the purpose of using the proceeds to be paid on account of the prior indebtedness of the Hedin Company to New Amsterdam Casualty Company and the net proceeds were received by said New Amsterdam Casualty Company as

set forth in the said affidavit of Kahl K. Spriggs and credited to the account of said J. D. Hedin Construction Company, Inc.; that said sale and conveyance was effected, according to affiant's information and belief, in entire good faith and in the firm belief that New Amsterdam Casualty Company had procured a lien against said property by reason of the deed in trust dated the 25th day of November, 1959, as aforesaid, and in the firm belief, as affiant now believes, that it was entitled to the same, and in the same belief that such preference as said deed in trust gave to New Amsterdam Casualty Company was a lawful preference and subject to no challenge by any other creditor in the absence of an adjudication of said J. D. Hedin Construction Company, Inc. in bankruptcy within four months thereafter in accordance with the applicable laws of bankruptcy; that, by reason of the foregoing, affiant believes that the plaintiff, F. S. Bowen Electric Co., Inc., is not entitled to challenge the transaction or transactions described in this action and prays that the Second Amended Complaint herein may be dismissed with prejudice as to all defendants.

/s/ Robert J. Murray

[Jurat, dated March 29, 1962]

EXHIBIT "A"

[to Affidavit of Robert J. Murray, dated March 29, 1962]

REALTY TITLE INSURANCE COMPANY, INC.
(A Maryland Corporation)

RECORD TITLE POLICY BINDER

TO: David B. Nicholson, Esquire
 Southern Building
 Washington, D. C.

Application Number 73876

Re: Lot 801, Square 4307

REALTY TITLE INSURANCE COMPANY, INC. hereby certifies:

That it has examined the title to the land described in Schedule "A" hereof, and upon payment of the premium, this Company will issue its Record Title Policy

insuring that according to the records of the District of Columbia on the 1st day of August, 1961, as of which date the search of the public records was completed, the fee simple title to said land was vested in

KAHL K. SPRIGGS

subject only to the encumbrances, liens, charges, objections, exceptions or defects, all as shown in Schedule "B" hereof.

This Company agrees to issue its Record Title Insurance Policy, on its usual form, upon payment of the premium therefor within 120 days from the date hereof.

It is understood and agreed that said Policy will insure the record title to be as herein set forth subject to: (1) such changes in the status thereof that may intervene between the aforesaid date and the date of such Policy by the recordation of any instruments or the filing of any suits affecting the title or by the release, discharge or correction of any of the items shown in Schedule "B" hereof; (2) any question or objection which may be brought to the attention of this company between the date hereof and the date of settlement.

This Binder is preliminary to settlement and to the issuance of a Record Title Insurance Policy and shall become null and void: (1) unless such Policy is issued and the premium therefor paid within 120 days from the date hereof; (2) if the applicant, his attorney or agent makes any untrue statement with respect to any material fact or suppresses or fails to disclose any material fact or if any untrue answers are given to this company to material inquiries before the issuance of its Title Policy; (3) if there is no settlement at this company within 120 days from the date hereof, this Binder shall be null and void if our charges therefor have not been paid in full.

NOTE: A Record Title Insurance Policy indemnifies the insured only against defects, liens and encumbrances appearing on the records. If broader coverage is desired against matters not appearing of record, which may adversely affect the title to the land herein described, such as forgery, fraud, insanity, infancy and concealed marriages, a policy of title insurance of this type should be requested.

Executed this 16th day of August, 1961

If you have any questions regarding this report, please communicate with the undersigned Title Officer.

[Realty Title Insurance
Company Seal]

REALTY TITLE INSURANCE COMPANY, INC.

By /s/ Daniel J. Smith
ASSISTANT TITLE OFFICER

"Schedule "A"**Description of Property:**

Lots numbered Twenty-one (21) to Twenty-five (25), both inclusive in Square numbered Forty-three Hundred Seven (4307) in Harry A. Kite's subdivision of part of a tract of land called "Granby," as per plat recorded in Liber 82 at folio 10 in the Surveyor's Office of the District of Columbia.

Said property being now known for assessment and taxation purposes as Lot numbered Eight Hundred One (801) in Square numbered Forty-three Hundred Seven (4307).

"SCHEDULE "B"

1. Deed of Trust from J. D. Hedin Construction Co., a Delaware Corp., to Samuel Scrivener, Jr. and Junior F. Crowell, Trustees, dated July 6, 1951 and recorded July 10, 1951 in Liber 9507 at folio 561. Secures Perpetual Building Association, D. C., \$250,000.00 money loaned, may receive additional amounts. This Deed of Trust is subject to unrecorded Lease on part of the above property, dated June 4, 1951, ending June 30, 1961, by and between J. D. Hedin Construction Company, Inc., Lessor, to Bergree Hotel Corporation, Lessee, with rental at \$5,000.00 per month, and with option to Lessee to renew for an additional period of 5 years, and the said J. D. Hedin Construction Co. as Lessor under said Lease, hereby assigns same, including management of the property and premises covered thereby, and the collection of the rents due thereunder, to Perpetual Building Association, this assignment however not to become effective unless and until there shall be default in the payment of the loan secured by this deed of trust, or there shall be default in any of the terms of this deed of trust, it being understood and agreed that said J. D. Hedin Construction Co., shall not collect rent under said Lease for more than one month in advance without the written consent of Perpetual Building Association. Party secured has right to substitute trustees.
2. Deed of Trust from J. D. Hedin Construction Co., a Delaware corp., to Kahl K. Spriggs and David B. Nicholson, Trustees, dated November 25, 1959 and recorded December 28, 1959 in Liber 11359 at folio 554. Whereas, the New Amsterdam Casualty Company, a New York corp. has guaranteed the payment of a certain promissory note dated November 25, 1959, executed by J. D. Hedin Construction Co. and J. D. Hedin, to the Equitable Trust Company, Baltimore, Maryland in principal sum of \$480,000.00 arising out of contract for which New Amsterdam Casualty Company as surety, has executed

performance and payment bonds for J. D. Hedin Construction Co., a principal and whereas, New Amsterdam Casualty Company has executed performance and payment bonds, as surety for J. D. Hedin Construction Co., as principal, more particularly described as follows: Bond No. 173109, Contract No. V1006C-48, dated January 11, 1955, for the construction of Veterans Administration Hospital at Marion, Indiana; Bond No. 173595, Contract No. V1006C-68, alterations and addition to buildings and utilities at Veterans Administration Hospital, Houston, Texas; Bond No. 153878, Contract No. DA-49-080-eng-1990, construction of laboratory building and utilities, Camp Detrick, Maryland; Bond No. 226245, construction of the Northend High School, Hagerstown, Maryland; Bond No. 241852, construction of Southwest Freeway, Second to Fourth Street, Washington, D.C.; Bond No. 263906, Contract No. NBY-11388, Specification No. 11388/57, construction of 150 Bachelor Officer's Quarters with Mess Marine Corps Schools, Quantico, Virginia; Bond No. 279364, construction of Frank W. Ballou, Sr. High School, Fourth Street between Mississippi Avenue and Savannah Street, S. E., Washington, D.C.; Bond No. 240945, construction of Newport Junior High School, Wheaton, Maryland; and Whereas, liabilities have been incurred by New Amsterdam Casualty Company on its payment bonds given in connection with several of the above mentioned contracts, judgments have been rendered, suits have been instituted and claims have been made on several of the said payment bonds executed by New Amsterdam Casualty Company, as surety, for J. D. Hedin Construction Co., as principal; and Whereas, party of first part desires to secure New Amsterdam Casualty Company with respect to the aforesaid guaranty of promissory note.

NOTE: This Trust is secured against caption and other property.

3. Lease dated June 4, 1951 and recorded July 30, 1951 in Liber 9522 at folio 300 among the Land Records of the District of Columbia, by and between J. D. Hedin Construction Company, Inc., a Delaware corporation, former owner of caption, Lessor, and Bergree Hotel Corporation, a Maryland corporation, Lessee, as follows: Term: 10 years to begin July 1, 1951 and to end June 30, 1961. Consideration: \$600,000.00 to be paid in equal installments of \$5,000.00 on the first day of each month during term of lease, first payment payable July 1, 1951; or Lessee will pay a sum equal to 30% of gross room and/or apartment business in each year, whichever is greater. Lessee may operate a dining room, coffee shop and/or bar on leased premises with additional rental payments of 5% on gross food sales and 10% on gross alcoholic beverage sales. Option to renew for additional 5 years.

4. Lease dated August 23, 1951 and recorded October 17, 1951 in Liber 9575 at folio 412 among the Land Records of the District of Columbia, by and between J. D. Hedin Construction Company, Inc., a Delaware corporation, former owner of caption, lessor, and Hedin House Catering Corporation, a Maryland corporation, Lessee, as follows: Term: 10 years, commencing September 1, 1951, ending August 31, 1961. Option to renew for two additional periods of 5 years each, on 30 days notice. Consideration: 6% of the gross income derived from business done on premises, food and liquor business as adjunct to hotel business---by Bergree Hotel Corporation in said building. Rental payments to be made on 15th day of each calendar month computed on gross business of preceding month.
5. Subject to the possible outstanding interest of Barbara J. McGrew under a Deed of all interest of a sales contract from George F. Woth, said Deed being dated May 10, 1961 and recorded May 11, 1961 in Liber 11597 at folio 251, among the Land Records of the District of Columbia.
6. Proof of payment of the following judgments and liens against J. D. Hedin Construction Company, former owner of caption property:
 - (a) Miscellaneous Judgment No. 9-61: U.S.A. for use and benefit of National U.S. Radiator Corp., Drayer Hanson Div. vs. J. D. Hedin Construction Co. and New Amsterdam Casualty Co., judgment on May 20, 1959 in the United States District Court for Southern District of Texas, Houston Division, for plaintiff against both defendants for \$25,135.12 (\$20,214.23; principal \$1,642.40 interest, attorneys fees and interest \$3,278.49), by Order filed in the United States District Court for the District of Columbia on February 21, 1961.
 - (b) Miscellaneous Judgment No. 10-61: U.S.A. for use and benefit of York Corp. vs. J. D. Hedin Construction Co., Inc. and New Amsterdam Casualty Co., Inc., judgment on May 26, 1959 in the United States District Court for Southern District of Texas, Houston Division, for plaintiff against both defendants for \$46,000.00, plus \$3,863.76 interest from January 1, 1958 to May 26, 1959, plus attorneys fees of \$7,479.56 plus interest at 6% per annum from May 26, 1959, filed in the United States District Court for the District of Columbia on February 21, 1961, judgment assigned by plaintiff to use of New Amsterdam Casualty Company, Inc.
 - (c) Miscellaneous Judgment No. 11-61: U.S.A. for use and benefit of Minneapolis-Honeywell Regulator Co. vs. J. D. Hedin Construction Co., Inc. and New Amsterdam Casualty Co., judgment on May 20, 1959 in the United States District Court for Southern District of Texas, Houston Division, for plaintiff against both defendants for \$85,926.25 (\$72,245.30 principal, \$5,867.93 interest,

\$7811.52 attorneys fees) and costs, filed in the United States District Court for the District of Columbia on February 21, 1961, judgment assigned by plaintiff to use of New Amsterdam Casualty Co.

(d) United States Tax Lien No. 1011-61: United States vs. J. D. Hedin Construction Co., for F.E.C.A. and Withholding Taxes for 1960 in the sum of \$212.87, assessed March 10, 1961, and filed in the United States District Court for the District of Columbia on June 5, 1961.

(e) United States Tax Lien No. 1226-61: United States vs. J. D. Hedin Construction Co., for F.I.C.A. and Withholding Taxes for 1960 in the sum of \$81.23, assessed May 5, 1961, filed in the United States District Court for the District of Columbia on July 20, 1961.

7. Building restriction line as shown on recorded plat of subdivision.
8. Subject to the right of the J. D. Hedin Construction Co. and for John D. Hedin to occupy rent free for a period of 3 years from April 26, 1961, those rooms in the Southwest corner of the building known as J. D. Hedin's Office, Oliver's Office, Snyder's Office, with vault and one waiting room.
9. Taxes and assessments and water rent charges as to which the Assessor and Water Registrar for the District of Columbia will certify.

djs;fwb

Building and zoning regulations and notices of municipal violations are not included in this examination and no certification is made in reference thereto.

Item(s) set out in Schedule "B" is (are) digest(s) only; for full terms and provisions see recorded instrument(s).

[Filed April 10, 1962]

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION OF ALL DEFENDANTS FOR SUMMARY JUDGMENT

1. The basic issue involved in this action is whether the conveyance of a valuable hotel property from Defendant Hedin to the various defendants was a fraudulent conveyance because it was made to "hinder, defraud and delay plaintiff and other creditors." This is the allegation of the complaint. Defendants have not even bothered to deny that the conveyance had that purpose (it being obvious that such was in fact its sole purpose).

Defendants have submitted an affidavit, based on information and belief and obtained "from an examination of the records and correspondence of New Amsterdam Casualty Co.". Even from this self-serving source, the conclusion of said affidavit is the affiant's belief that plaintiff is not entitled to challenge the transactions. Nowhere do defendants deny the purpose of removing title to the property from Defendant Hedin was for the purpose of hindering, delaying and defrauding plaintiff and other creditors. This perhaps explains the absence of any answer by any defendant.

Obviously this is an issue which prevents summary judgment. The statute, 12 D. C. Code 401, specifically provides that "the question of fraudulent intent shall be deemed a question of fact and not of law."

2. It should be noted that plaintiff's lien interest in the subject property precedes any claim thus far advanced by any of defendants. Plaintiff's claim is based on a judgment entered November 24, 1958, which became a lien on the Defendant Hedin's property on that date (15 D. C. Code, #103). The judgment was appealed, remanded and modified and is still unpaid. It amounts, with interest, to over \$40,000.00.

Plaintiff's lien on the property remains unsatisfied and all the conveyances subsequent to November 24, 1958 would appear to have been made with the rather obvious purpose of trying to avoid plaintiff's rights to the property of the judgment debtor during a time when plaintiff could not enforce its rights.

3. Another reason why summary judgment would be improper in the present case is because the affidavits being advanced in support of the motion are based on information and belief rather than on personal knowledge. Rule 56(e) states that the supporting affidavits "shall be made on personal knowledge". The Supreme Court held in Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, that this was a mandatory requirement.

The motion for summary judgment herein is supported basically by two affidavits. The affidavit of Robert J. Murray states that it is

being made "from an examination of the records and correspondence of said New Amsterdam Casualty Company" and is made "on information and belief" (Affidavit of Robert J. Murray, page 1). The affidavit of Kahl K. Spriggs states, after certain introductory material, that 'affiant is informed and believes and therefore avers . . .'" (Affidavit of Kahl K. Spriggs, page 2, line 3). The affidavit of Morris Abrams is apparently on personal knowledge. Mr. Abrams cannot of necessity state the reason motivating the other defendants, which reason is the crucial issue in the lawsuit. Therefore, inasmuch as the supporting affidavits are not based on personal knowledge, the motion for summary judgment should be denied.

4. Finally, there is a fundamental reason why the motion for summary judgment must necessarily fail. The crux of this case is the bona fides of the transfer from J. D. Hedin Construction Co., Inc. in the first instance. Subsequent transfers, at least until Mr. and Mrs. Abrams, are all persons who stand in the same relationship to New Amsterdam Casualty Company. When good faith is the issue, summary judgment is not proper. This is the holding of the Court of Appeals for the District of Columbia Circuit in Dewey v. Clark, 170 F.2d. 766 (1950). In that case good faith was asserted by affidavits made on personal knowledge which has not even been done in this case. But even in that event, the court said that summary judgment was inappropriate. See 180 F.2d. at pages 772, 773.

Respectfully submitted,

/s/ MICHAEL A. SCHUCHAT
Attorney for Plaintiff

[Filed April 10, 1962]

STATEMENT OF GENUINE ISSUES PER LOCAL RULE 9(b)

The following are genuine issues of fact which preclude summary judgment:

1. Whether the various conveyances from Defendant Hedin Construction Co. and amongst the defendants were made for the purpose of hindering, delaying and defrauding creditors.
2. Was Defendant New Amsterdam Casualty Co. a creditor of Defendant Hedin on November 24, 1958 and to what extent?
3. Is Defendant Hedin merely a wholly owned subsidiary of New Amsterdam Casualty Co., and, if so, when did it become such?

Respectfully submitted,

/s/ Michael A. Schuchat,
Attorney for Plaintiff.

[Filed May 7, 1962]

ORDER GRANTING MOTION FOR SUMMARY
JUDGMENT AND MOTION TO DISMISS

Upon consideration of the motion of the defendants herein for a summary judgment, and upon consideration of the separate motion of the defendants, Morris Abrams and Rose Abrams, to dismiss the Complaint as to them; and the Court having heard argument thereon, and having examined the record herein including the several affidavits filed in support of the said motions; and the Court having concluded that the issues as to the defendants, Morris Abrams and Rose Abrams, are moot; and the Court having further concluded that there are no material issues of fact presented by the record and that the other defendants are entitled to judgment as a matter of law from the facts shown of record herein, it is by the Court this 7th day of May, 1962,

ADJUDGED and ORDERED that the motion of the defendants, Morris Abrams and Rose Abrams, to dismiss the Complaint as to them be and the same is hereby granted and said Complaint is as to them dismissed; and it is further,

ADJUDGED and ORDERED that the motion of all defendants for summary judgment be and it is hereby granted and the Complaint be and it is hereby dismissed as to all defendants.

/s/ EDWARD A. TAMM
Judge

Certificate of Service: * * *

